No. 92-1223

In the Supreme Court of the United States

OCTOBER TERM, 1992

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, ET AL., PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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QUESTION PRESENTED

Whether the congressionally recognized public interest in facilitating federal sector labor relations is appropriately weighed in evaluating the release of federal employee names and home addresses to unions representing those employees, when the request is made under Section 7114(b)(4) of the federal sector labor statute.

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BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

OPINIONS BELOW

The opinion of the court of appeals is reported at 975 F.2d 1105, and is appended to the petition (Pet. App. 1a-34a). The decisions of the Federal Labor Relations Authority (Pet. App. 37a-64a) are reported at 37 F.L.R.A. 652 and 37 F.L.R.A. 930.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1992. A petition for rehearing and suggestion of rehearing *en banc* was denied on De-

cember 7, 1992. The petition for a writ of certiorari was filed on January 19, 1993 and was granted on March 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135, the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a(b), are reproduced in the appendix to this brief (FLRA App. 1a-6a).

STATEMENT

A. Background—The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute (Labor Statute), as amended, 5 U.S.C. 7101-7135 (1988). Under the Labor Statute, the responsibilities of the Federal Labor Relations Authority (Authority), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Labor Statute. 5 U.S.C. 7104-7105.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983) (*BATF*); *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop

specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Labor Statute]." *BATF*, 464 U.S. at 97.

Congress specified in the Labor Statute that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. 7101(a). Consistent with this finding of Congress, the Labor Statute requires an agency to accord exclusive recognition to a labor organization selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election. 5 U.S.C. 7111(a). A labor organization accorded such exclusive recognition has an obligation to represent fairly "all employees in the unit" regardless of whether they are union members. 5 U.S.C. 7114(a)(1). Employees in a unit of exclusive recognition have the right to refrain from joining a labor organization as dues-paying members. 5 U.S.C. 7102. The agency and the labor organization have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. 7114(a)(4). The duty to bargain in good faith extends to matters relating to conditions of employment affecting bargaining unit employees. 5 U.S.C. 7103(a)(12) and 7117; *see also Fort Stewart Sch.* v. *FLRA*, 495 U.S. 641, 644 (1990).

Congress enacted Section 7114(b)(4) of the Labor Statute to enable unions to meet their representational duties. That section requires a federal employer to furnish the exclusive bargaining representative "to the extent not prohibited by law" with any requested data that is, among other things, "reasonably available"; "normally maintained by the agency

in the regular course of business"; and "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." 5 U.S.C. 7114(b)(4).

The Labor Statute also makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Labor Statute; "refuse to consult or negotiate in good faith with a labor organization"; or "otherwise fail or refuse to comply with any provision" of the Labor Statute. 5 U.S.C. 7116(a)(1), (5), and (8).

B. Proceedings In The Present Case

1. *The Authority's Decisions In The Present Case*

This case concerns two Authority unfair labor practice decisions and orders consolidated for review in the court below. The case arose from requests by unit employees' exclusive representatives to the agency employers under 5 U.S.C. 7114(b)(4) for the employees' names and home addresses (Pet. App. 2a-3a).[1] The facts in both Authority proceedings are virtually identical. The first case (No. 90-4722 before the Fifth Circuit) involved an information request made by the United Food and Commercial Workers Union, Local 1657 (UFCW), which represents a bargaining unit composed of all regular full-

[1] References to "the agency employers" are to the U.S. Department of Defense, U.S. Department of Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi ("Navy Exchange"), and the U.S. Department of Defense, Army and Air Force Exchange, Dallas, Texas ("AAFES" or "Lowry AF Base"), which were involved in proceedings before the Authority.

time and part-time employees, and all intermittent employees of the Navy Exchange in Gulfport, Mississippi (Pet. App. 2a). Specifically, the UFCW asked for a variety of information, including bargaining unit employee names and home addresses, "for the purpose of starting upcoming negotiations with the [Navy] Exchange as soon as possible" (Jt. App. 60).[2]

The second case (No. 90-4775 before the Fifth Circuit) involved a request made by the American Federation of Government Employees, Local 1345 (AFGE), the union representing a consolidated, worldwide bargaining unit composed of all regular full-time and part-time employees, and all intermittent employees of AAFES which is headquartered in Dallas, Texas and operates a facility at Lowry AF Base in Colorado (Pet. App. 3a). Specifically, AFGE requested unit employees' home addresses, as well as other information about unit employees (Jt. App. 114).

As relevant here, the agency employers denied the unions' requests for employee home addresses, and the unions filed unfair labor practice charges with the Authority (Jt. App. 58, 113). The Authority ordered the disclosure of unit employee names and home addresses (Pet. App. 37a-51a, 52a-64a). The Authority based both of its decisions and orders in this case on its prior decision in *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 F.L.R.A. 515 (1990) (*Portsmouth*), *rev'd sub nom. FLRA* v. *Department of the Navy, Ports-*

[2] "Jt. App." references are to the joint appendix in the court below, which was submitted to this Court on April 16, 1993.

mouth Naval Shipyard, New Hampshire, 941 F.2d 49 (1st Cir. 1991) (Pet. App. 38a, 53a).

2. *The Authority's Decisions In* Portsmouth *and Its Predecessor,* Farmers Home Administration

Section 7114(b)(4) of the Labor Statute establishes a broad data disclosure requirement for federal agency employers as part of their bargaining obligation under the Labor Statute. One exception to this requirement, here at issue, is whether disclosure is "prohibited by law." The Privacy Act, 5 U.S.C. 552a (1988), generally bars unconsented disclosure of personal data such as home addresses unless, among other things, release is required under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1988). 5 U.S.C. 552a(b)(2). Exemption 6 of the FOIA (5 U.S.C. 552(b)(6)) in turn allows withholding of personal data contained in personnel files if its release would constitute a "clearly unwarranted invasion of personal privacy." This requires balancing the public interest served by disclosure against the privacy interest preserved by withholding the data. *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976).

a. The Authority first ordered agency employer disclosure to unions of employee names and home addresses in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 F.L.R.A. 788 (1986) (*Farmers Home Administration*), *enforced in part and remanded sub nom. United States Department of Agriculture* v. *FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated on other grounds and remanded*, 488 U.S. 1025 (1989). Consistent with FOIA Exemption 6, the Authority weighed the public interest in improved federal sector labor relations resulting from direct union/employee communications at home against individual employee privacy, and found the balance favored disclosure. This result was affirmed by numerous courts of appeals.[3]

However, the D.C. Circuit reversed the Authority. *FLRA* v. *Department of the Treasury, Fin. Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989) (*Dep't of the Treasury*), *cert. denied*, 493 U.S. 1055 (1990). The D.C. Circuit based its decision on this Court's then-recent decision in *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*). In that case the Court found that the public interest to be weighed, in cases arising under FOIA Exemption 7(C) (5 U.S.C. 552(b)(7)(C)), is whether the data requested sheds light on "what the government is up to." 489 U.S. at 773. The D.C. Circuit held that home addresses do not reveal anything about government activities, and thus found that employee privacy outweighs this public interest in disclosure.

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[3] *United States Dep't of Agric.* v. *FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated on other grounds and remanded*, 488 U.S. 1025 (1989); *United States Dep't of Navy and Philadelphia Naval Shipyard* v. *FLRA*, 840 F.2d 1131 (3d Cir.) (*Philadelphia Naval Shipyard*), *petition for cert. dismissed*, 488 U.S. 881 (1988); *United States Dep't of the Air Force* v. *FLRA*, 838 F.2d 229 (7th Cir.), *petition for cert. dismissed*, 488 U.S. 880 (1988); *United States Dep't of Health and Human Servs.* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987) (*HHS*), *petition for cert. dismissed*, 488 U.S. 880 (1988).

The Authority's disclosure order in *Farmers Home Administration* resulted from the Second Circuit's reversal of an earlier Authority decision denying a union request for home address disclosure. *American Fed'n of Gov't Employees, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986) (*AFGE, Local 1760*).

b. In its lead *Portsmouth* decision the Authority reaffirmed *Farmers Home Administration* and held that the public interest to weigh under FOIA Exemption 6, in data requests made under the Labor Statute, is facilitation of the federal labor relations scheme. Thus, the Privacy Act does not bar home address disclosure. The Authority recognized in *Portsmouth* that to resolve this disclosure issue, it would be required to rule on the interrelationship of three laws, the Labor Statute, the FOIA, and the Privacy Act, and to harmonize them to the extent possible. 37 F.L.R.A. at 519.

In *Portsmouth* the Authority was mindful of the fact that the home address disclosure issue arises under the Labor Statute, and thus involves predominantly labor relations concerns. 37 F.L.R.A. at 524-25, 537. The Authority focused (37 F.L.R.A. at 528) particularly on the congressionally recognized public interest that underlies Section 7114(b)(4), namely, that an effective federal sector collective bargaining system promotes the public interest. 5 U.S.C. 7101(a). The Authority also detailed a number of specific rights and obligations set out in the Labor Statute, such as the duty of fair representation, which would be facilitated by disclosure of information to unions under Section 7114(b)(4). 37 F.L.R.A. at 527-28. For example, the Authority in *Portsmouth* discussed how home address mailings to employees would increase the ability of unions to fulfill their statutory duty of fair representation to all unit employees, whether or not they were union members, by providing an effective means of communicating with employees about work-related issues. *Id.* Balancing this public interest in disclosure of home addresses against employees' privacy interest, the Authority found it "clear that the public interest served by disclosure far outweighs the privacy interest of individual employees in their . . . home addresses." 37 F.L.R.A. at 535.

Additionally, the Authority found in *Portsmouth* that direct application of *Reporters Committee* would result in treating federal sector unions like any other member of the public requesting FOIA documents. 37 F.L.R.A. at 526. Such a result "would render irrelevant the significant public interest in disclosure" of information to unions under Section 7114(b)(4), and improperly "disregard the interrelation of rights and obligations under the [Labor] Statute." *Id.* The Authority also noted that ordering disclosure was consistent with private sector labor law and did not create an unwarranted disparity between the means available to private and federal sector unions for communicating with bargaining unit employees under the National Labor Relations Act (NLRA), 29 U.S.C. 151-188 (1988 & Supp. II 1990). 37 F.L.R.A. at 526.

The Authority in *Portsmouth* respectfully rejected the D.C. Circuit's holding in *Dep't of the Treasury*, that the Privacy Act barred disclosure. 37 F.L.R.A. at 523. In the Authority's view, *Dep't of the Treasury* was premised on a misapplication of this Court's decision in *Reporters Committee*. 37 F.L.R.A. at 523. The Authority concluded in *Portsmouth* that *Reporters Committee* should be applied to disclosure requests arising directly under the FOIA and not to requests arising under the Labor Statute. 37 F.L.R.A. at 523.

3. *The Court of Appeals' Decision in the Instant Case*

The Fifth Circuit enforced the Authority's name and home address disclosure orders and denied the agencies' petitions for review (Pet. App. 1a-34a). Agreeing that employees' names and home addresses are necessary to the full and proper conduct of collective bargaining, the court focused on whether disclosure of those names and home addresses is "prohibited by law" under Section 7114(b)(4) of the Labor Statute (Pet. App. 9a-26a).

In examining the Privacy Act bar to unconsented disclosure of personal data and its FOIA exception (Pet. App. 10a), the court observed that FOIA "embodies 'a general philosophy of full agency disclosure'" (Pet. App. 11a). However, the court turned its attention to whether the disclosure in this case would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 6 (*id.*).

The court noted that prior to *Reporters Committee* a consensus had existed among the circuit courts of appeals which had considered the issue of whether unions representing federal employees were entitled to obtain the information under the Labor Statute (Pet. App. 11a-12a). In determining whether disclosure was warranted, these courts weighed the public interest in promoting collective bargaining by federal employees against the employees' interest in protecting their names and home addresses from disclosure (Pet. App. 12a). Several of these courts also took notice of the fact that employers in the private sector are required to disclose the same information to employees' exclusive representatives, and found no

apparent reason to treat federal union representatives differently (Pet. App. 13a-14a).[4]

The court below also noted that this Court's decision in *Reporters Committee* resulted in a disappearance of the prior consensus among the circuit courts on the disclosure issue (Pet. App. 15a-16a). In *Reporters Committee*, this Court rejected a disclosure request arising directly under FOIA for an FBI "rap sheet" because disclosure would have constituted an unwarranted invasion of personal privacy under FOIA Exemption 7(C). The Court determined that the disclosure interest must be measured in terms of its relation to FOIA's basic purpose to open agency action to the light of public scrutiny (Pet. App. 17a-18a). Following *Reporters Committee*, a split developed among the courts of appeals on whether the disclosure of unit employees' home addresses to their exclusive representatives was required under the Labor Statute (Pet. App. 16a).[5]

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[4] *Philadelphia Naval Shipyard*, 840 F.2d at 1138; *HHS*, 833 F.2d at 1132 n.4; *AFGE, Local 1760*, 786 F.2d at 557.

[5] Along with the Fifth Circuit, the following circuit courts of appeals agreed with the Authority that providing employees' home addresses to their exclusive representative under Section 7114(b)(4) of the Labor Statute was not prohibited by the Privacy Act. *FLRA* v. *Department of the Navy, Navy Ships Parts Control Ctr.*, 966 F.2d 747 (3d Cir. 1992) (*en banc*); *FLRA* v. *U.S. Dep't of the Navy, Navy Resale & Servs. Support Office, Field Support Office, Auburn, Wash.*, 958 F.2d 1490 (9th Cir. 1992) (petition for rehearing and suggestion for rehearing *en banc* stayed); and *FLRA* v. *Department of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv.*, 954 F.2d 994 (4th Cir. 1992), *vacated and reh'g granted* (Apr. 22, 1992) (stayed before the court *en banc*).

Several other circuits have reversed the Authority on the home address disclosure issue. *FLRA* v. *United States Dep't*

The Fifth Circuit found that the courts of appeals which had barred disclosure had "read too much into *Reporters Committee*," and agreed with the circuit courts that held that disclosure was required under the Labor Statute (Pet. App. 18a). The court below gave two reasons. First, the court observed that *Reporters Committee* involved FOIA Exemption 7(C) rather than FOIA Exemption 6 (Pet. App. 19a-20a). In this regard, the court below noted this Court's recognition that Exemption 7(C), which merely requires that an invasion of privacy be "unwarranted," should be applied more broadly than Exemption 6, where the standard is a "clearly unwarranted invasion" of privacy. 489 U.S. at 7.

Second, the court below found that "unlike the complainants in *Reporters Committee*, the unions' disclosure requests in this case do not arise under the FOIA" (Pet. App. 20a). Rather, the court indicated, "their requests originate from within the [Labor Statute] and its Congressionally endorsed framework for protecting and promoting collective bargaining" (*id.*). As a result, the court below held, "*Reporters Committee* has absolutely nothing to say

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of Defense, Army and Air Force Exch. Serv., Dallas, Tex., 984 F.2d 370 (10th Cir. 1993); *FLRA* v. *U.S. Dep't of Defense*, 977 F.2d 545 (11th Cir. 1992); *FLRA* v. *Department of the Navy, Navy Exch., Naval Training Station, Naval Hosp., Great Lakes, Ill.*, 975 F.2d 348 (7th Cir. 1992); *FLRA* v. *Department of the Navy, Naval Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA* v. *Department of Veterans Affairs Medical Ctr., Newington, Conn.*, 958 F.2d 503 (2d Cir. 1992); *FLRA* v. *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 941 F.2d 49 (1st Cir. 1991); *FLRA* v. *Department of the Treasury, Fin. Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990).

about the [Labor Statute], or the situation that arises when disclosure is initially required by some statute other than the FOIA, and the FOIA is employed only secondarily" (Pet. App. 20a).

The court below rejected the agency employers' claim that the plain language of the Labor Statute, Privacy Act, and FOIA requires unaltered application of *Reporters Committee* to the instant case (Pet. App. 22a). In this connection, the court said, "[w]hatever else *Reporters Committee* may have done, it certainly did not amend the language of the [Labor Statute], the Privacy Act, or the FOIA," which laws invariably had been construed to allow home address disclosure under the Labor Statute prior to *Reporters Committee* (*id.*).

In sum, the court found that *Reporters Committee* "does not require the federal courts, when balancing interests favoring and opposing disclosure, to ignore public interests other than those embodied in the FOIA when the disclosure request originates from some statute other than the FOIA" (Pet. App. 25a). In such a case, the court below stated, "it is proper . . . to consider the public interest embodied in the statute which generates the disclosure request" (Pet. App. 25a-26a). This approach, the court indicated, "fully accords not only with the [Labor Statute]—with its explicit declaration that it seeks to promote collective bargaining and its direction to unions that they represent nonmember employees as faithfully as they do their members—but also fully accords with Congress's aim in establishing the FOIA—to provide a workable formula 'which encompasses, balances, and protects all interests'" (Pet. App. 26a). Accordingly, the court ruled that the public interest in

collective bargaining outweighed the employees' privacy interests in nondisclosure of their names and home addresses (*id.*). The court concluded that disclosure would not constitute a clearly unwarranted invasion of privacy, and was thus not prohibited by the Privacy Act. The court therefore granted the Authority's enforcement applications requiring disclosure of the information (*id.*).

Judge Emilio M. Garza filed a dissent, concluding that *Reporters Committee* controlled the disclosure issue (Pet. App. 27a-34a). Although Judge Garza agreed that *Reporters Committee* did not consider the Labor Statute's "explicit policy favoring collective bargaining as in the public interest," he nevertheless found that the language of Section 7114 (b)(4) and *Reporters Committee* made the policy irrelevant (Pet. App. 32a). Further, while Judge Garza agreed with the majority that *Reporters Committee* dealt with Exemption 7(C), not Exemption 6, he did not view such differences as determinative here (Pet. App. 29a-31a).

SUMMARY OF ARGUMENT

I. Congress concluded in the Labor Statute that "labor organizations and collective bargaining in the civil service are in the public interest." The Authority correctly identified advancement of this public interest for balancing against individual privacy, in ordering employer agencies to disclose bargaining unit employee home addresses to unions. The unions here requested employee home addresses under Section 7114(b)(4) of the Labor Statute, which governs employer data disclosure obligations. Section 7114 (b)(4) makes general reference to other laws which

may bar disclosure, and this includes the Privacy Act. But the Privacy Act's bar to unconsented disclosure of personal data, and the exception to that bar for disclosure required by the Freedom of Information Act (FOIA), must be construed in harmony with the Labor Statute. The Authority's rulings observe this principle. The agency employers' approach, on the other hand, improperly creates the fiction that the subject data requests were made under the FOIA, thus ignoring the Labor Statute in assessing the public interest in disclosure.

A. The Authority gives effect to Congress's purpose in the Labor Statute of creating an efficient federal sector labor relations system, by ruling for the improved communications resulting from union home address mailings. Unions will be better able to perform their statutory representational duties if they are better informed about employee interests, and employees will be better informed as to the benefits resulting from union representation. It is inconsistent to ignore these Labor Statute considerations when deciding whether agency employers commit unfair labor practices under the very same Labor Statute by withholding employee home addresses.

The Authority also gives effect to congressional purposes in the Privacy Act and FOIA. Congress rejected a proposal that under the Privacy Act all personal data be barred from unconsented disclosure. Rather, it opted for balancing public and privacy interests in disclosing personal data under FOIA Exemption 6. The Authority similarly opted for a balanced approach to disclosure of personal data consistent with Exemption 6.

As to the FOIA, Exemption 6 only specifies that any privacy invasion caused by disclosure of personal

data be "warranted" by furtherance of the public interest. Neither its language nor its legislative history specifies what aspect of the public interest is to be weighed against individual privacy under Exemption 6. Rather, Congress envisioned that the mechanics for Exemption 6 balancing would be fashioned by the courts flexibly, to accommodate all relevant interests, and this is in fact what occurred. The Authority, consistent with Congress's intent in Exemption 6, opted for a workable formula that considers all relevant interests, by looking to facilitation of the federal sector labor relations system as the public interest to be weighed against individual privacy.

B. The public interest to be considered in disclosure of personal data under FOIA Exemption 7(C), identified by this Court in *Reporters Committee*, i.e., learning "what the government is up to," is inapplicable to this case. First, the request for data in *Reporters Committee* was made directly under the FOIA, not Section 7114(b)(4) of the Labor Statute. Accordingly, as the court below recognized, that decision did nothing to affect the consensus of the courts of appeals prior to *Reporters Committee*, that the strong public interest in effective federal sector labor relations outweighs the minimal privacy invasion caused by home address disclosure. Moreover, there is a clear practical need to selectively adapt provisions of the FOIA, like Exemption 6, to a data request made under the Labor Statute. No court has suggested that every aspect of the FOIA, including, for example, its jurisdictional and attorney fee provisions, applies to data requests under Section 7114(b)(4). In short, it is mere pretense to

treat a data request under Section 7114(b)(4) as having been made under the FOIA.

Reporters Committee is also inappropriately applied here because that case involved FOIA Exemption 7(C), while the instant case concerns Exemption 6. The threshold for withholding data under Exemption 6 is much higher than for Exemption 7(C), thus minimizing the applicability of *Reporters Committee* to this case.

C. The Authority's rulings also avoid undesirable results that stem from the employers' insistence on treating this case as if it had arisen under the FOIA. First, lower courts relying on *Reporters Committee* already have begun to sharply curtail the flow of data, such as evaluative and disciplinary records, that unions have long used to perform their representational duties. Second, the employers' view would create an unnecessary disparity between the communications methods available to federal sector unions and their private sector counterparts, the latter clearly being entitled to receive employee home addresses from employers under the National Labor Relations Act.

II. When the public interest of facilitating federal sector labor relations is weighed against individual privacy, the balance favors disclosure. The improved communications process resulting from home address mailings makes for a more efficient labor relations system, which in turn aids the public interest as identified by Congress in Section 7101(a) of the Labor Statute.

In contrast, the invasion of individual privacy is relatively minimal, as the vast majority of federal courts of appeals have held. Home addresses are

commonly available in telephone directories, voter registration lists, and the like. Moreover, the Authority has identified ways for individual employees to protect their privacy interests, ranging from seeking deletion from union mailings to barring address disclosure if it would cause imminent danger to the employee.

The considerable advancement of the public interest resulting from disclosure, measured against the rather limited privacy invasion suffered, means the employers cannot sustain their burden of showing that disclosure is unwarranted. Accordingly, the judgment of the court below, enforcing the Authority's disclosure orders, should be affirmed.

ARGUMENT

I. THE AUTHORITY CORRECTLY USES FACILITATION OF FEDERAL SECTOR LABOR RELATIONS AS THE PUBLIC INTEREST TO BE BALANCED AGAINST EMPLOYEE PRIVACY INTERESTS WHEN APPLYING FOIA EXEMPTION 6 TO DATA REQUEST CASES ARISING UNDER THE LABOR STATUTE

This case arises under the Labor Statute. The unions here involved made their home address list requests under Section 7114(b)(4) of that law. The ultimate issue before the Authority and the court below was whether the agency employers' refusals to supply the lists were unfair labor practices under Section 7116(a) of the Labor Statute. The instant case is therefore, first and foremost, a federal sector labor relations case. This fact, we respectfully submit, must be borne in mind when assessing whether the Authority correctly identified facilitation of the

federal sector labor relations process as the public interest to weigh against employee privacy in ordering disclosure of employee home addresses.

Because Section 7114(b)(4) calls for disclosure "to the extent not prohibited by law," it is a general reference law. 2B *Sutherland Statutory Construction* § 51.07 (5th ed. 1992). This general reference brings the Privacy Act into Section 7114(b)(4) analysis. The Privacy Act's bar to unconsented disclosure of personal data would apply here, unless an exception to that general rule applies. 5 U.S.C. 552a (b). One such exception permits unconsented disclosure if required by the FOIA (5 U.S.C. 552). 5 U.S.C. 552a(b)(2). In turn, FOIA Exemption 6, 5 U.S.C. 552(b)(6), allows for withholding of data from release if the public interest in disclosure does not outweigh individual privacy interests. *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976).

As a general reference law, Section 7114(b)(4) is to be interrelated with the laws referenced, so as to give effect to all laws involved. *Pearce* v. *Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 603 F.2d 763, 769-71 (9th Cir. 1979); see also *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) ("classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute"). The Authority's rulings in this case are true to this basic principle of statutory construction.

As we show below, the Authority applied the Labor Statute, the Privacy Act, and the FOIA so as to give full force and effect to all three laws. This approach

is vastly preferable to the approach of the agency employers in this case and the courts of appeals that have ruled against the Authority, which gives effect only to the FOIA while negating the public interest identified in the Labor Statute. The Authority's construction of these three laws, which includes within the balancing under FOIA Exemption 6 the facilitation of the federal sector labor relations scheme against employee privacy interests, should therefore be adopted by the Court. See, e.g., *FLRA* v. *United States Dep't of the Navy*, 966 F.2d 747, 757 (3d Cir. 1992) (*en banc*) (*Navy Ships Parts*).

The agency employers' view, that for requests for personal data arising under the Labor Statute we should balance against individual privacy the same public interest identified by this Court in *Reporters Committee* for cases arising under the FOIA, is myopic and should be rejected. Cf. *Dep't of the Treasury*, 884 F.2d at 1461 (R. Ginsburg, J., concurring) ("iron[y]" of construing the Labor Statute to diminish union access to unit employees warrants consideration of whether to qualify application of *Reporters Committee* to the Labor Statute). Further, adoption of the agency employers' view will needlessly cause very undesirable results for federal sector labor relations.

A. The Authority's Identification In Section 7114(b)(4), Of Facilitating Federal Sector Labor Relations As The Public Interest To Weigh Against Employee Privacy, Gives Full Effect To All Three Laws Here Involved

1. The Authority's rulings here at issue give effect to Congress's purpose in enacting the Labor Statute. One of the most fundamental policies of the Labor

Statute is the explicit recognition of the link between facilitation of the federal sector collective bargaining process and promotion of the public interest. See, e.g., *Navy Ships Parts*, 966 F.2d at 750; *United States Dep't of Health and Human Servs.* v. *FLRA*, 833 F.2d 1129, 1132-34 (4th Cir. 1987) (*HHS*), *petition for cert. dismissed*, 488 U.S. 880 (1988). As Congress stated in Section 7101(a) of the Labor Statute, "the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . safeguards the public interest . . . . Therefore, collective bargaining [is] in the public interest."

The agency employers here do not dispute that disclosure of employee names and home addresses is "necessary" for unions to perform their representational responsibilities under the Statute. Every court of appeals to have considered the issue has agreed with the Authority that the communications process created by union home address mailings to employees is categorically more effective than other forms of communications, such as those occurring at the work place.[8] For example, employees are better able in the home to consider union communications free of work

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[8] *FLRA* v. *United States Dep't of Defense, Army and Air Force Exch. Serv., Dallas, Tex.*, 984 F.2d 370, 373 (10th Cir. 1993); *Navy Ships Parts*, 966 F.2d at 753; *FLRA* v. *U.S. Dep't of the Navy, Navy Resale & Servs. Support Office, Field Support Office, Auburn, Wash.*, 958 F.2d 1490, 1494 (9th Cir. 1992) (*Navy Resale*) (petition for rehearing and suggestion for rehearing *en banc* stayed); *FLRA* v. *Department of Veterans Affairs Medical Ctr., Newington, Conn.*, 958 F.2d 503, 507-508 (2d Cir. 1992); *Department of the Treasury*, 884 F.2d at 1449; *United States Dep't of Agric.* v. *FLRA*,

place pressures, and to provide a more thoughtful response to union questionnaires on potential bargaining subjects. This can play a vital role in formulating union bargaining proposals and representation strategies that are more closely attuned to actual employee interests, and eliminate wasteful union efforts that are not in line with actual employee desires. This in turn helps assure that management representatives will not be wasting their time discussing with the union matters that do not bear on actual employee concerns. The "full and proper discussion, understanding and negotiation" of matters within the scope of collective bargaining, which Congress designed Section 7114(b)(4) to foster, is thus advanced by home address disclosure. Accordingly, there is a clear public interest served by such disclosure because it "contributes to the effective conduct of public business . . . ." 5 U.S.C. 7101(a)(1)(B).

Moreover, the improved union/employee communications derived from home address mailings can help unit employees exercise their rights, under Section 7102 of the Labor Statute, to join or otherwise assist the labor organizations that represent them. More specifically, unions should be able to communicate in the most effective way with employees about grievances, back pay awards, and other rights and benefits. Employees would then be better able to gain awareness of those rights and benefits that are a product of the associational rights conferred under Section 7102 of the Labor Statute.

Finally, enhancing the union's ability to communicate in the most effective manner with its constituent

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836 F.2d 1139 (8th Cir. 1988), *vacated on other grounds and remanded*, 488 U.S. 1025 (1989); *HHS*, 833 F.2d at 1131.

employees on representation matters fits neatly in the overall scheme for employee representation devised by Congress in the Labor Statute. As the Authority and various circuit courts of appeals have recognized,[7] Congress has carefully set out in the Labor Statute specific relationships among federal sector unions, bargaining unit employees, and federal agency employers. Significantly in this connection, a federal sector union has a duty of fair representation to "all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. 7114(a)(1); see also *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 531 (1989). A union must discharge this duty despite the fact that bargaining unit employees are not required to become dues-paying members of the union. 5 U.S.C. 7102. It is undisputed here that a union is better able to fulfill this statutory duty if it can avail itself of the improved communications with employees made possible by direct home mailings.

It is senseless to begin statutory analysis with the uniquely interrelating rights and obligations for unions under the Labor Statute, proceed through the Privacy Act and the FOIA, and then return to the Labor Statute for final resolution of the ULP charge with unions stripped of the unique rights and obligations Congress assigned them in the Labor Statute. As the Authority (37 F.L.R.A. at 526-27)[8] and the

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[7] See, e.g., *Navy Ships Parts*, 966 F.2d at 750-51; *Navy Resale*, 958 F.2d at 1495 (9th Cir. 1992).

[8] Because the Authority based its holdings in the instant case almost exclusively on its analysis in *Portsmouth*, 37 F.L.R.A. at 515, references to Authority holdings in this case

court below (Pet. App. 23a) recognized, we should avoid disregarding Congress's intent in enacting the Labor Statute by engaging in the fiction that data requests made under the Labor Statute were actually made under the FOIA. Yet this is just the result the employer agencies here, and some courts of appeals, have endorsed.

Nowhere is the illogic of the agency employers' argument more evident than in their claim (Br. 18) that the Authority errs in supposedly relying on the unions' status as labor organizations in ruling on the subject data requests. According to *Reporters Committee*, 489 U.S. at 771, such reliance is impermissible under Exemption 7(C), in ruling on requests brought directly under the FOIA, because under the FOIA "any person" can make a request for data. While this rule makes perfect sense for data requests made directly under the FOIA, where virtually anyone with a pencil and paper can lawfully request government information, it is woefully inapposite in Labor Statute cases. Under Section 7114(b)(4) of the Labor Statute, only one entity in the world, that is, the certified exclusive representative of bargaining unit employees, has legal standing to make a data request. Moreover, exclusive representatives must satisfy certain requirements for disclosure under Section 7114(b)(4), such as establishing "necess[ity]" for data, that FOIA requesters need not meet. It is thus appropriate that data requests under the Labor Statute will be evaluated taking into ac-

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will, where appropriate, be to *Portsmouth*. This Authority decision, as well as its earlier *Farmers Home Administration* decision, are found in the Joint Appendix for the proceedings in the court below.

count the requester's status as an exclusive representative, because Congress wanted these specific entities to have special rights to data in order to further identifiable representation purposes.[9]

2. The Authority's statutory analysis also gives full effect to the policies and purposes of the Privacy Act. In its deliberations on a bill that eventually became the Privacy Act, Congress rejected a proposal that all personal data be categorically exempt from unconsented disclosure. Instead, Congress adopted what is now Section 552a(b)(2) of the Privacy Act, allowing unconsented disclosure of personal data if required by the FOIA. The purpose of Section 552a(b)(2) was to "preserve the status quo as interpreted by the courts regarding the disclosure of personal information" under the FOIA.[10] 120

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[9] Because of the unique standing of an exclusive representative to request data under Section 7114(b)(4) of the Labor Statute, affirmance of the court below would not serve as precedent for persons making data requests directly under the FOIA itself. Nor does research disclose other disclosure statutes like Section 7114(b)(4), serving public interests different from the FOIA, which would be affected by a ruling favorable to the Authority in this case. Thus, contrary to the agency employers' claim (Br. at 22-23, 25), executive branch agencies will not become "clearing houses" for commercial firms to obtain personal data on federal employees.

[10] At the time the Privacy Act was being considered by Congress, the status quo under the FOIA for name and home address lists allowed for disclosure in certain circumstances. *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971). Although *Getman*'s holding was subsequently called into question by *FBI* v. *Abramson*, 456 U.S. 615, 631 (1982), the fact remains that at the time of passage of the Privacy Act, Congress was aware of home address disclosure under the FOIA. The floor debates on the Privacy Act also show that Congress was

Cong. Rec. 40,406 (1974); see also *Porter* v. *United States Dep't of Justice*, 717 F.2d 787, 797-98 (3d Cir. 1983); *Greentree* v. *U.S. Customs Serv.*, 674 F.2d 74, 81-83 (D.C. Cir. 1982). Contrary to *amicus* National Right To Work Legal Defense Foundation's claim (Am. Br. 3-7), Section 552a(b)(2) of the Privacy Act shows that Congress intended no greater protection from unconsented disclosure of personal data than was available under Exemption 6 of the FOIA. *Florida Medical Ass'n, Inc.* v. *Department of Health, Educ., and Welfare*, 479 F. Supp. 1291, 1306 (M.D. Fla. 1979).

The Authority's rulings in these cases are consistent with the purposes of Section 552a(b)(2) of the Privacy Act. In that section Congress took a balanced approach to disclosure of personal data by preserving the disclosure provisions of the FOIA for data such as address lists, over the extreme of banning all disclosure of such data. In the instant case the Authority, consistent with FOIA principles (see pp. 27 to 29, below), also has taken a balanced approach to disclosure of personal data by carefully weighing whether the public interest served by release of the personal data here involved outweighs the individuals' privacy interest in withholding. Its de-

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fully aware, at the time of passage of the Privacy Act, that federal agencies were disclosing home address lists in some circumstances to FOIA requesters. 120 Cong. Rec. 40,883-84 (1974) (remarks of Congressman Moorhead). Finally, soon after passage of the FOIA the Attorney General indicated that individual home addresses may be disclosable under Exemption 6 in certain circumstances. Department of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 37 (1967).

cision, after balancing, to direct disclosure is consistent with Congress's intent in enacting Section 552a(b)(2) of the Privacy Act.

3. The Authority's decisions in this case also give full effect to the principles Congress established in the FOIA. Exemption 6, here at issue, on its face only specifies that an invasion of privacy caused by release of personal data be "warranted" by service of a public interest, to compel disclosure of the data. The plain language of Exemption 6 does not specify what factor is to be weighed against individual privacy, to determine if the invasion of that privacy is "warranted."

The House and Senate reports on the FOIA do not provide any greater specificity concerning the nature of the public interest to be weighed against individual privacy in determining whether the invasion of privacy caused by disclosure is "warranted." The Senate Report, in discussing the meaning of a "clearly unwarranted invasion of personal privacy" under Exemption 6, said only that the phrase "enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The Senate Report also stated, in connection with the disclosure of personal data under the FOIA, that "[s]uccess [in determining whether to disclose such data] lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." *Id.* at 38; see also *Department of Justice* v. *Landano*, 61 U.S.L.W. 4485, 4489 (U.S.

May 24, 1993), *vacating* 956 F.2d 422 (3d Cir. 1992) ("particularized approach" to application of FOIA exemptions is consistent with Congress's intent to provide "workable rules" of FOIA disclosure).

The House Report states only that the phrase "clearly unwarranted invasion of personal policy" in FOIA Exemption 6 "provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. 1497, 89th Cong., 2nd Sess. 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428.

The language and legislative history of the balancing provision in FOIA Exemption 6 thus demonstrate that Congress did not have in mind a specific public interest that would "warrant" an invasion of personal privacy by disclosure of personal data. Rather, Congress anticipated that the public interest factor to be weighed in Exemption 6 balancing would be developed on a case-by-case basis. See generally, Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 798 (1967).

Indeed, application by the lower courts of the balancing process under FOIA Exemption 6 was marked by varying views of what public interest should be weighed against an invasion of privacy. For example, the D.C. Circuit held that the public interest to be weighed under Exemption 6 was "the public benefit gained from making information freely available." *Board of Trade of the City of Chicago* v. *Commodity Futures Trading Comm'n*, 627 F.2d 392, 398 (D.C. Cir. 1980). That court did not believe that the public interest under Exemption 6 could be limited to the FOIA's "core purpose" of monitoring activities of the government. *Ditlow* v. *Shultz*, 517 F.2d 166, 172 (D.C. Cir. 1975). On the other hand, the Third Circuit considered whether data disclosed would inform the public about the activities of government as the public interest to be weighed under Exemption 6. *Committee on Masonic Homes* v. *NLRB*, 556 F.2d 214, 220 (3d Cir. 1977).

It took this Court's decision in *Reporters Committee*, a case involving FOIA Exemption 7(C), to resolve, for cases arising directly under the FOIA itself, the varying views of the lower courts on identification of the public interest to be balanced under that exemption. In *Reporters Committee* the Court established the monitoring of government activities as the public interest to be considered in cases arising under the FOIA. 489 U.S. at 773.

It is clear from the foregoing that the identification of the public interest to be balanced under FOIA privacy exemptions is a product of judicial augmentation, and not congressional action itself. Under Exemption 6 itself, Congress only wanted to realize a modest measure of some unspecified public benefit resulting from disclosure, to justify an invasion of privacy. Although this Court in *Reporters Committee* has identified the public interest to be balanced in cases arising under the FOIA, it has not done so for cases arising under the Labor Statute. Accordingly, the Authority acted consistently with the concerns of Congress in enacting FOIA Exemption 6 when it looked to the public interest expressly identified by Congress in the Labor Statute, in resolving requests by unions for personal data under Section 7114(b)(4).

B. The Public Interest In Disclosure Of Personal Data Identified In *Reporters Committee*, Concerning What the Government Is Up To, Is Not Properly Applied To This Case

The Authority's conclusion (37 F.L.R.A. at 526), affirmed by the court below (Pet. App. 26a) and other courts of appeals,[11] that *Reporters Committee* does not govern requests for personal data under the Labor Statute, is correct for two reasons. First, and most important, the request for data under *Reporters Committee* was made directly under the FOIA itself, while the data requests in the instant case were made under Section 7114(b)(4) of the Labor Statute. Second, FOIA Exemption 7(C) was at issue in *Reporters Committee*, while Exemption 6 is at issue in the instant case.

1. As set forth at p. 7, n.3, above, every court of appeals that considered home address disclosure under the Labor Statute before *Reporters Committee* held that the public interest expressly identified in Section 7101(a) of the Labor Statute, concerning unions and collective bargaining in the federal sector, was properly weighed against employee privacy interests. As the court below noted (Pet. App. 22a), nothing in *Reporters Committee* purported to change the strong public interest Congress recognized in federal sector collective bargaining. Nor did *Reporters Committee* amend the Privacy Act or the FOIA to change the applicability of that public interest to Labor Statute data requests. To the contrary, as the court below noted (Pet. App. 22a), "it can hardly be said that the 'plain language' of [the Privacy Act,

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[11] *Navy Ships Parts*, 966 F.2d at 757; *Navy Resale*, 958 F.2d at 1495.

FOIA, and Labor Statute] forbids disclosure, or that to bring into consideration the strong public interest in collective bargaining would require any imaginative reconstruction of those statutes."

Moreover, there is a clear need to adapt provisions of the FOIA, like Exemption 6, to suit the needs of a case arising under another disclosure law such as the Labor Statute, which simply "borrows the FOIA's disclosure calculus for another purpose." Pet. App. 23a. For example, not even the agency employers here would contend that the jurisdictional provision of the FOIA (5 U.S.C. 552(a)(4)(B), requiring original suit in the district courts) applies to data requests by exclusive representatives under Section 7114(b)(4). Nor would they likely argue that a successful requester of data under Section 7114(b)(4) is entitled to attorney fees under the FOIA's fee provision, 5 U.S.C. 552(a)(4)(E). Similarly, the public interest analysis under FOIA Exemption 6 properly contemplates the law under which the case arose, i.e., the Labor Statute.

This Court's identification in *Reporters Committee* of a public interest to be balanced in cases arising under the FOIA does not mean that the Court lacks the flexibility to identify another congressionally recognized public interest to be balanced in Labor Statute cases, while remaining consistent with Congress's purposes in enacting Exemption 6 of the FOIA. Cf. *District of Columbia* v. *Carter*, 409 U.S. 602, 620-21 (1973) (same word can have different meanings in different parts of same act, to meet purposes of the law, where the subject matter is different); *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 433 (1932) (same).

Such flexibility in the application of FOIA Exemption 6 is appropriate here because the FOIA was not designed to further a system of collective bargaining, as is the Labor Statute. These different purposes in the laws under which data requests can arise justify differing applications of the same statutory language in Exemption 6, to give effect to both laws. The Authority (37 F.L.R.A. at 523) and the court below (Pet. App. 24a), consistent with the statutory construction principles discussed at p. 19, above, correctly recognized this fundamental point, and these holdings should be affirmed.[12]

2. As the court below also correctly noted (Pet. App. 19a), *Reporters Committee* is additionally distinguishable because it involved FOIA Exemption 7(C), while the instant case involves Exemption 6. As this Court noted in *Reporters Committee*, 489 U.S. at 756, these FOIA exemptions differ in two significant ways. First, an invasion of personal privacy must be "clearly unwarranted" under Exemption 6, whereas such an invasion need only be "unwarranted" under Exemption 7(C), to justify withholding of personal data. Second, Exemption 6 applies to disclosures which "would constitute" an invasion of pri-

[12] Accordingly, the agency employers' reference (Br. 25) to this Court's observation in *Reporters Committee*, 489 U.S. at 765, that disclosure of personally identifiable data is "not what the framers of the FOIA had in mind," is of no moment to this case. The disclosure policies of the Labor Statute are properly consulted in this case, when it comes to adapting FOIA principles to the present controversy, because the data requests were made under the Labor Statute, and not the FOIA. *Amicus* National Right To Work Foundation's claim on this point (Am. Br. 7-8) is also without merit for this reason.

vacy, while Exemption 7(C) applies to disclosure which "could reasonably be expected to constitute" such an invasion.

These differences establish that the threshold for withholding information under Exemption 6 is significantly higher than for Exemption 7(C). Accordingly, as this case involves Exemption 6 and not Exemption 7(C), it is appropriate not to apply the holding of *Reporters Committee* here for this reason as well.

C. The Authority's Identification Of Facilitation Of The Federal Sector Collective Bargaining Process As The Public Interest To Balance Against Employee Privacy Interests Avoids Several Undesirable Results That Arise From Treating This Case As If It Had Arisen Under the FOIA

The Authority's decisions in this case are not only preferable under principles of statutory construction and unaffected by *Reporters Committee*, but they also avoid some very undesirable results that occur when this case is treated as if it had arisen under the FOIA, as urged by the agency employers (Br. 15-17). As shown below, the Authority's holdings in these cases avoid the sharp reduction in disclosure to unions of personal data of all types that will result from treating these home address cases as if they had arisen under the FOIA. These Authority holdings also avoid creating an unnecessary discrepancy between private and federal sector unions in the means they have available to communicate with bargaining unit members.

1. Federal sector unions, fulfilling their representational responsibilities under the Statute, have long received a wide array of personal data concerning

individual employees.[13] Yet treating the unions in the instant case like any FOIA requester from the public at large, as the agency employers insist on doing (Br. 18), would necessarily jeopardize the ability of unions to obtain this wide array of personal data so vital to their representational functions.

Treating union requests for data implicating personal privacy under Section 7114(b)(4) as if they were made under the FOIA would limit application of the public interest to that identified in *Reporters Committee* for FOIA Exemption 6 balancing. That is, the extent to which documents reveal "what the government is up to" would be balanced against individual privacy interests to determine if the privacy invasion is "clearly unwarranted." *Reporters Committee*, 489 U.S. at 773. Yet some courts of appeals have indicated that personal data such as individual employee evaluations and disciplinary records will normally not tell anything about "what the government is up to." Accordingly, personal data previ-

[13] See, e.g., *American Fed'n of Gov't Employees* v. *FLRA*, 811 F.2d 769 (2d Cir. 1987) (employee official time and attendance records and progress reviews and performance appraisals); *American Fed'n of Gov't Employees, Local 1345* v. *FLRA*, 793 F.2d 1360 (D.C. Cir. 1986) (disciplinary records of unit employees); *Department of the Treasury, Internal Revenue Serv.*, 39 F.L.R.A. 241 (1991) (supervisors' performance standards, objectives, and appraisals); *Internal Revenue Serv., Omaha, Neb.*, 25 F.L.R.A. 181 (1987) (performance appraisal of candidate selected for position); *U.S. Army Corps of Eng'rs, Kansas City Dist., Kansas City, Mo.*, 22 F.L.R.A. 667 (1986) (name and minority status of bargaining unit employees); *Veterans Admin. Regional Office, Denver, Col.*, 7 F.L.R.A. 629 (1982) (names and alphanumerical designations of employees rated by ranking panel for promotion action).

ously ordered released by the Authority and the courts (see note 13, above), will no longer be releasable to unions should the Court adopt the agency employers' scheme for evaluating requests for personal data under the Labor Statute.[14]

The impact of this result on federal sector labor relations is obvious and grave. If unions cannot obtain the data needed to make knowing choices about what grievances to file or what bargaining proposals to advance, one of two undesirable results will frequently occur: unions either will not file meritorious grievances and push worthwhile bargaining proposals, or unmeritorious grievances and bargaining proposals will be pressed, in either case for lack of needed information. The ensuing loss of employee rights and benefits, or waste of time and resources spent on unmeritorious matters, is clearly undesirable and should be avoided.

2. The Authority's disposition of the home address issue also avoids an unnecessary disparity between federal and private sector unions, as to the means they have available to communicate with unit employees. It is clear beyond dispute that private sector

[14] In point of fact this has already begun to occur. In *Dunkelberger* v. *Department of Justice*, 906 F.2d 779 (D.C. Cir. 1990), the court rejected pursuant to *Reporters Committee* a request made directly under the FOIA for disciplinary records of an FBI agent. In *FLRA* v. *Department of Commerce*, 962 F.2d 1055 (D.C. Cir. 1992), that court held, based on *Reporters Committee* and *Dunkelberger*, that a union was not entitled, under Section 7114(b)(4), to data concerning individual employee awards based on superior performance. In both cases the failure of the requested data to shed light on how the government operates was a basis for the court's rejection of the data request.

exclusive representatives are entitled to receive unit employee home address lists from employers under the National Labor Relations Act (NLRA), 29 U.S.C. 151-188 (1988 & Supp. II 1990). *NLRB* v. *Associated Gen. Contractors*, 633 F.2d 766, 773 (9th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *NLRB* v. *Pearl Bookbinding Co.*, 517 F.2d 1108, 1113 (1st Cir. 1975); *United Aircraft Corp.* v. *NLRB*, 434 F.2d 1198, 1204 (2d Cir. 1970) (*United Aircraft*), *cert. denied*, 401 U.S. 993 (1971); *Star Tribune*, 295 N.L.R.B. 543, 565 (1989); *Massillon Community Hosp.*, 282 N.L.R.B. 675, 682 (1987) (*Massillon Hosp.*); *Georgetown Holiday Inn*, 235 N.L.R.B. 485, 486 (1978).[15] Both the courts and the National Labor Relations Board have recognized that employee home address lists can enable unions to better perform their representational responsibilities. See, e.g., *United Aircraft*, 434 F.2d at 1206; and *Massillon Hosp.*, 282 N.L.R.B. at 682.[16]

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[15] Moreover, this Court has held that an employer must provide candidate unions in an election campaign with the names and home addresses of bargaining unit employees. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (*Wyman-Gordon*). In that case the Court endorsed the National Labor Relations Board's decision in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966) (*Excelsior*), requiring such disclosure because union home address mailings ensured a more effective form of communication than work place contacts.

[16] Several state courts have also ruled that unions representing state and local government employees are entitled to employee home addresses. See, e.g., *International Plant Guard Workers of Amer.* v. *Department of State Police*, 373 N.W.2d 713 (Mich. 1985); *Pottle* v. *School Comm. of Braintree*, 482 N.E.2d 813 (Mass. 1985); *Browning* v. *Walton*, 351 So. 2d 380 (Fla. Ct. App. 1977).

Although the Labor Statute and the NLRA are not to be read *in pari materia* for all purposes,[17] private sector case law generally provides strong guidance in parallel public sector matters. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987); *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1286-87 (D.C. Cir. 1983); see also 5 U.S.C. 7101(a)(1) ("experience in both private and public sector employment" indicates that employee organizations and collective bargaining in the federal government "safeguards the public interest."). As this Court has noted, the Labor Statute and the Authority were patterned after the NLRA and the Board. *Bureau of Alcohol, Tobacco, and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983).

In the instant case, no good policy reason appears for distinguishing between federal and private sector unions, as to the available methods of communication with unit employees. The benefits of enabling federal sector unions to communicate in an effective manner with their constituent employees (see pp. 21 to 23, above) are as great as for private sector unions.

The agency employers' claim (Br. 28), that due to their coverage under the Privacy Act federal employees have greater expectations of privacy than do private sector employees, begs the question. As shown above at p. 25, the Privacy Act is not a complete bar to disclosure of all personal data about individuals. Rather, that Act entitles individuals to no greater protection from unauthorized disclosure of personal data than is afforded under FOIA Exemption 6. And in the particulars of this case, FOIA Exemption 6 is

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[17] *Fort Stewart Sch.* v. *FLRA*, 495 U.S. 641, 648 (1990).

not properly construed as allowing for withholding the home addresses here at issue (see p. 27, above).

Additionally, the differences in privacy protection between private and federal sector employees are not as significant as the agency employers claim (Br. 27-28). Private sector employees do in fact have privacy rights to be protected in data disclosures to unions under the NLRA. *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979) (personally sensitive data, such as aptitude test results, not required to be disclosed to union). Thus, the Privacy Act is not properly interpreted to provide for significantly greater privacy protections for federal employees than the protection case law under the NLRA affords private sector employees. Indeed, federal employees have even less reason to expect a privacy interest as to work-related personal information than do private employees because intimate details concerning employment are required by regulation to be made public. 5 C.F.R. 293.311 (1992) (a federal employee's pay grade, salary, and job responsibilities, among other things, are available to the public); see also *FLRA* v. *Department of the Treasury*, 884 F.2d 1446, 1460 (D.C. Cir. 1989) (R. Ginsburg, J., concurring), *cert. denied*, 493 U.S. 1055 (1990). We submit that this work related information is even more intimate than an employee's home address.

In sum, the Authority's resolution of these cases, as affirmed by the court below, gives full effect to not just one but all three of the laws at issue here, is not governed by this Court's *Reporters Committee* decision, and avoids some very undesirable results that would occur if this case is treated as if it had arisen under the FOIA as the agency employers urge. For these reasons, the Authority's reliance on facilitation of federal sector labor relations as the public interest to be weighed against employee privacy, in FOIA Exemption 6 balancing, should be affirmed. Trina Jones, Note, *Collective Bargaining in the Federal Public Sector: Disclosing Employee Names and Addresses Under Exemption 6 of the Freedom of Information Act*, 89 Mich. L. Rev. 980 (1991) (approving the Authority's use of the Labor Statute's public interest in balancing against employee privacy, and directing disclosure).

II. FACILITATION OF FEDERAL SECTOR LABOR RELATIONS CAUSED BY HOME ADDRESS RELEASE OUTWEIGHS ANY RESULTING INVASION OF PERSONAL PRIVACY, AND RELEASE IS THEREFORE NOT BARRED BY FOIA EXEMPTION 6

Having identified the correct public interest to weigh against employee privacy interests in withholding home addresses under FOIA Exemption 6, it is clear that the public interest served by disclosure outweighs the invasion of privacy caused by release. Accordingly, as each court of appeals that has adopted this public interest for balancing purposes has held,[18] FOIA Exemption 6 does not bar home address disclosure under the Labor Statute.

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[18] *Navy Ships Parts*, 966 F.2d 747; *Navy Resale*, 958 F.2d 1490; *United States Dep't of Agric.* v. *FLRA*, 836 F.2d 1139 (8th Cir. 1988) (*Dep't of Agriculture*), *vacated on other grounds and remanded*, 488 U.S. 1025 (1989); *United States Dep't of Health and Human Servs.* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987), *petition for cert. dismissed*, 488 U.S. 880 (1988); *American Fed'n of Gov't Employees, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986).

A. Home Address Disclosure Serves The Public Interest By Facilitating Federal Sector Labor Relations

As discussed at pp. 21 to 23, above, the form of union/employee communication resulting from home address mailings is superior to alternative forms of communication focused on the work place. As the Authority held in *Portsmouth* (37 F.L.R.A. at 531), home mailings are exclusively under the union's control, and employees are free to consider a union's mailing without any of the restraints that may be perceived at the work place. At home an employee "has the leisure and the privacy to give the full and thoughtful attention to the union's message that the workplace generally does not permit." *Portsmouth*, 37 F.L.R.A. at 532.

This most effective form of union communication with employees aids the labor relations system established by Congress in the Labor Statute in several ways, as previously indicated. For example, unions would be better able to formulate bargaining demands more attuned to real employee interests; employees would have a better way to learn of their entitlement to benefits achieved by their union on their behalf; and the union would have the best means available to ensure that it is able to fulfill its duty of fair representation to all unit employees. These obvious enhancements for the labor relations system embodied in the Labor Statute constitute a very substantial public interest served by disclosure.

The agency employers' claim (Br. 28-29), that a union can obtain employee home addresses at the work place, does not detract from the public interest served by disclosure. First, as indicated at p. 21, above, every court to have addressed the issue has

rejected this sort of argument and agreed with the Authority that employer home address disclosure is "necessary" for effective labor relations under Section 7114(b)(4). Second, in *Excelsior*, 156 N.L.R.B. at 1241-44, the NLRB rejected this idea as unreliable for ensuring effective union/employee communications in the analogous union election compaign setting. In *Wyman-Gordon*, 394 U.S. at 767, this Court endorsed the Board's conclusion on this point. The same result should be reached here.

B. Employees Experience Only A Minimal Invasion Of Personal Privacy As A Result Of Home Address Disclosure To Their Unions

Although the Authority has recognized (*Portsmouth*, 37 F.L.R.A. at 532) that employees have some privacy interest in their home addresses, it has, consistent with the view of the overwhelming majority of appeals courts to decide the issue,[19] correctly characterized that interest as minimal. This conclusion is correct as to both the anonymity and solitude dimensions to individual privacy. Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 433 (1980)

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[19] *Navy Ships Parts*, 966 F.2d at 759 ("minimal"); *Navy Resale*, 958 F.2d at 1496 ("minimal"); *FLRA* v. *Department of the Navy, Portsmouth Naval Shipyard*, 941 F.2d 49, 56 (1st Cir. 1991) ("modest"); *United States Dep't of the Air Force* v. *FLRA*, 838 F.2d 229, 232 (7th Cir.), *petition for cert. dismissed*, 488 U.S. 880 (1988) ("minuscule"); *Dep't of Agriculture*, 836 F.2d at 1143 ("not particularly compelling" privacy interest); *American Fed'n of Gov't Employees, Local 1760* v. *FLRA*, 786 F.2d 554, 556 (2d Cir. 1986) ("modest"); *Ditlow* v. *Schultz*, 517 F.2d 166, 170 (D.C. Cir. 1975) ("less than a substantial invasion of privacy").

(there are three independent elements to privacy: secrecy, anonymity, and solitude).

A person's home address is generally one of the least private facts concerning an individual, frequently appearing in telephone directories, voter registration lists, and the like. See, e.g., *American Fed'n of Gov't Employees, Local 1760* v. *FLRA*, 786 F.2d 554, 556 (2d Cir. 1986). Moreover, the context of the list itself reveals nothing personal about an employee other than the fact of his/her federal employment. Compare, e.g., *Multnomah County Medical Society* v. *Scott*, 825 F.2d 1410 (9th Cir. 1987) (individual's appearance on a list of Medicare recipients reveals information about age and health). Accordingly, an employee's interest in secrecy and anonymity is only minimally affected by home address release to unions.

Nor can it be said that release will lead to a significant intrusion on employee solitude. As the Authority pointed out in *Farmers Home Administration*, 23 F.L.R.A. at 793, the simple expedient of discarding unwanted communications can minimize the perceived invasiveness of unwanted mailings. Almost 60 percent of the mail received by the average American household in 1991 (about 20 pieces a week) was advertising material, and some 54 percent of households indicated they either did not mind this advertising mail or wanted more of it. Demand Research Division, United States Postal Service, *The Household Diary Study, Fiscal Year 1991*, Vol. I, pp. I-2, I-3 (1992). Thus, most employees already receive in their homes every day a very substantial flow of unsolicited mail that might be expected to be more unwelcome than communications from their exclusive

bargaining agent. The occasional union questionnaire or notice concerning "bread-and-butter" employment matters, which would likely be of more immediate concern to an employee than, say, the latest department store catalogue, could scarcely be said to increase an employee's sense of intrusion by mail.[20]

The minimal privacy interest that individual employees have in their home addresses is in any event protected by the Authority from any potential harassment that may result from release. In *Portsmouth*, 37 F.L.R.A. at 533, the Authority reaffirmed its earlier holding in *Farmers Home Administration*, 23 F.L.R.A. at 798, that employees who can show a realistic threat of danger if their home addresses are released will be able to have their names and addresses omitted from the list released to the union.[21]

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[20] The agency employers' reliance (Br. 20) on *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728 (1970), for the proposition that a person's home is his/her castle, avails them nothing. For whatever may be the intrusive impact of receiving pornographic material in the mail, as was at issue in *Rowan*, union mailings as to employment conditions can hardly be put on the same scale of invasiveness. As the Postal Service statistics set forth above in the text show, most personal residences do not view run-of-the-mill unsolicited mailings as invasive at all.

[21] In *Farmers Home Administration* the Authority relied on *Shell Oil Co.* v. *NLRB*, 457 F.2d 615 (9th Cir. 1972). In that case the court found an employer did not commit unfair labor practices by refusing to provide a union with the names and home addresses of all unit employees, where several months prior to the request many employees engaged in a violent strike and harassed at their homes those employees who returned to work.

The agency employers' claim (Br. 21-22), that the Authority has not adequately protected employees from potential harassment, is baseless. For example, in *Department of the Navy, U.S. Naval Ordnance Station*, 33 F.L.R.A. 3 (1988); and *Veterans Admin., Riverside Nat'l Cemetery, Riverside, Cal.*, 33 F.L.R.A. 316 (1988), the Authority considered on the merits and found wanting claims that employees had legitimate concerns of imminent danger if their home addresses were released.[22] However, the fact that no employee in those cases was able to adduce credible evidence of imminent danger as a result of home address release does not mean that the Authority is unmindful of legitimate harassment claims.

Moreover, the Authority indicated in *Farmers Home Administration*, 23 F.L.R.A. at 793, that employees not wishing to receive union communications at home can either request that they be taken off the union's mailing list, or discard the unwanted communication. See, e.g., *Navy Ships Parts*, 966 F.2d at 759. Presumably, any union wanting to maintain employee support to remain the exclusive bargaining agent would honor such employee requests. Cf. *Excelsior*, 156 N.L.R.B. at 1244 (union seeking em-

[22] In *Department of the Navy*, 33 F.L.R.A. at 5, one employee affidavit indicated only that three years prior to the union's request a union member had threatened the affiant's life at the latter's home. A second affidavit indicated only that the employee "would not feel comfortable" if the union had the employee's home address. In *Veterans Admin.*, 33 F.L.R.A. at 317, the record reflected only that a number of unit employees did not wish to have their home addresses released.

ployee votes in election campaign will not likely harass employees at home).[23]

C. Balancing The Labor Relations Public Interest Served By Disclosure Against The Privacy Interest Invasion Strongly Favors Disclosure

The strong public interest under the Labor Statute in home address disclosure greatly outweighs the minimal invasion of personal privacy resulting from that disclosure. Unions will be able to categorically improve their ability to execute their representational responsibilities as a result of improved union/employee communications. This heightened union effectiveness enhances the overall effectiveness of the labor relations process in the federal sector, and this in turn effectuates the public interest as identified in Section 7101(a)(1) of the Labor Statute.

This substantial public interest served by disclosure clearly shows that the agency employers cannot sustain their burden of showing that the minimal privacy invasion resulting from disclosure is "clearly unwarranted" under FOIA Exemption 6. *EPA* v. *Mink*, 410 U.S. 73, 79 (1973). Thus, as the Authority held (37 F.L.R.A. at 531), when using the public interest in disclosure identified in the Labor Statute,

[23] Further, any employee aggrieved by union misuse of the mailing lists may have more direct recourse against the union. Gerald M. Griffith, Comment, *The Union's Right to Information at the Expense of Employees' Privacy Rights*, 15 U. Tol. L. Rev. 755, 804 (Winter 1984) (tort privacy or duty of fair representation actions may be available to employees claiming misuse of information).

FOIA Exemption 6 does not bar release of employee names and home addresses.[24]

In closing, an appropriate resolution of this case was foretold in the Fourth Circuit's case law on this issue. In *American Federation of Government Employees, Local 1923* v. *United States Department of Health and Human Services*, 712 F.2d 931 (4th Cir. 1983), that court, balancing a public interest consistent with *Reporters Committee*, rejected a request for employee home addresses made by a federal sector union directly under the FOIA.

In a later case where the same data was requested under the Labor Statute, the Fourth Circuit distinguished its earlier decision on the ground that the request in that case arose directly under the FOIA. *United States Dep't of Health and Human Servs.* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987), *petition for cert. dismissed*, 488 U.S. 880 (1988). Thereafter a

[24] Contrary to the agency employers' claim (Br. 19-20) and the ruling of the court below (Pet. App. 19a), disclosure is warranted even using the extent to which data shows "what the government is up to" as the public interest to weigh against individual privacy. Employee home addresses will enable any person interested in learning about operation of the subject agencies to question employees at home and obtain more candid information about agency operations than if the employee were contacted at work. For example, contacting employees at home would facilitate the polling of employees regarding whistleblower protections, safety and hazard reporting, disciplinary standards and other issues vital to the integrity and honesty of government. Such "derivative use" for data, in learning about the activities of government agencies, was expressly left open for FOIA Exemption 6 balancing in *United States Department of State* v. *Ray*, 112 S. Ct. 541 (1991). When weighed against the minimal privacy interest involved, the balance again favors disclosure.

panel of the Fourth Circuit was asked to reconsider its position in light of this Court's decision in *Reporters Committee*. *FLRA* v. *Department of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv.*, 954 F.2d 994 (4th Cir. 1992), *vacated and reh'g granted* (Apr. 22, 1992) (stayed before the court *en banc*). The panel reaffirmed its view that home address requests under the Labor Statute should be analyzed differently than requests made directly under the FOIA. The court of appeals balanced the public interest in an efficient federal sector labor relations system against employee privacy, and held the balance there favored disclosure. In brief, the *Reporters Committee* decision did not affect the panel's earlier analysis. Thus, the Fourth Circuit has already recognized the same distinction we ask this Court to recognize in the instant case: the law under which the case arises is determinative of the public interest to be weighed in assessing whether disclosure is warranted under FOIA Exemption 6.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, AS AMENDED, 5 U.S.C. §§ 7101-7135 (1988); AND RELEVANT PORTIONS OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. 552 (1988); AND THE PRIVACY ACT, 5 U.S.C. 552a (1988)

5 U.S.C. § 7101 provides:

"§ 7101. Findings and purpose

"(a) The Congress finds that—

"(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

* * * * *

5 U.S.C. 7102 provides:

"§ 7102. Employees' rights

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

* * * * *

5 U.S.C. 7114(a)-(b) provides:

"§ 7114. Representation rights and duties

"(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

* * * * *

"(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

* * * * *

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

"(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

"(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

"(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

* * * * *

5 U.S.C. 7116(a) provides:

"§ 7116. Unfair labor practices

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * * *

"(8) to otherwise fail or to comply with any provision of this chapter.

* * * * *

5 U.S.C. 552(b) provides:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(b) This section does not apply to matters that are—

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(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be

expected to endanger the life or physical safety of any individual;

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§ 552a. Records maintained on individuals

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(b) **Conditions of disclosure.**—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

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(2) required under section 552 of this title;

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